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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF SANTA CLARA**

11 **ANTELOPE VALLEY GROUNDWATER**
12 **CASES:**

13 Included Actions:

14 Los Angeles County Waterworks District No.
40 v. Diamond Farming Co.
Superior Court of California
15 County of Los Angeles, Case No. BC325201

16 Los Angeles County Waterworks District Noa
Superior Court of California
17 County of Kern, Case No. S-1500-CV-254-
348

18 Wm. Bolthouse Farms, Inc. v. City of
19 Lancaster
Diamond Farming Co. v. City of Lancaster
20 Diamond Farming Co. v. Palmdale Water Dist.
Superior Court of California
21 County of Riverside, consolidated actions
Case Nos. RIC 353840, RIC 344436,
22 RIC 344668

Judicial Council Coordination
Proceeding No. 4408

Santa Clara Case No. 1-05-CV-049053
Assigned to the Honorable Jack Komar

ANAVERDE'S OPPOSITION TO PUBLIC
WATER SUPPLIERS' MOTION IN
LIMINE NO. 1

Phase 2 Trial: October 6, 2008

Time: 9 a.m.

Location: LASC, Dept. 1

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1 Cross-defendant, Anaverde LLC (“Anaverde”) hereby submits the following Opposition to
2 California Water Service Company, City of Lancaster, City of Palmdale, Littlerock Creek
3 Irrigation District, Los Angeles County Water Works District No. 40, Palmdale Water District,
4 Palmdale Ranch Irrigation District, Quartz Hill Water District, and Rosamond Community
5 Services District’s (the “Public Water Suppliers” or “PWS”) Motion in Limine No. 1.

6 **I. INTRODUCTION**

7 Public Water Suppliers brought a motion to exclude “certain cumulative and unduly-time
8 consuming evidence which the Public Water Suppliers believe will be offered by Diamond
9 Farming and its related entity, Crystal Organic Farms [“Diamond Farming”].”¹ (Public Water
10 Suppliers Motion in Limine No. 1, Sept. 30, 2008 at 3:6-8.) The Public Water Suppliers
11 designated Mr. Scalmanini as their retained expert. (Public Water Suppliers Expert Witness
12 Designation, Aug. 15, 2008.)

13 Anaverde deposed Mr. Scalmanini on September 24, 2008, and learned that he largely
14 agreed with Anaverde’s position that Anaverde’s property falls outside the adjudication boundary.
15 Given that he is an “expert” for the PWS parties, Anaverde finds his position to be particularly
16 objective and instructive for this Court’s consideration as to whether Anaverde is a separate basin.
17 Since Anaverde was not part of the Phase 1 trial, the Court’s determination there is not binding on
18 it, and Anaverde fully intends to raise the issues testified to, by Mr. Scalmanini, at trial.

19 **II. ARGUMENT**

20 The alleged basis for this motion is that Diamond Farming will offer “cumulative”
21 evidence from Phase I of this adjudication. Though it may be true that Mr. Scalmanini has no
22 additional opinion or change to his opinion concerning his Phase 1 testimony, the fact that his
23 technical memorandum sets forth issues directly related to whether (and where) certain “sub-

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25 ¹ Diamond Farming provided that “Mr. Scalmanini will testify in accordance with the finding and
26 conclusions set forth in his technical memorandum dated January 2002 and identified as “Ground
27 Water Basin and Subbasin Boundaries Antelope Valley Groundwater Basin [(“Technical
28 Memorandum”)].” (*Id.* at 2:7-10.) Scalmanini’s 2002 Technical Memorandum was generated and
admitted before this Court for purposes of delineating the adjudication boundary (the “Basin”) during Phase 1 of this action.

1 basins”, or more accurately phrased, separate basins, exist within the adjudication boundary,
2 places the opinions postured in the 2002 Technical Memorandum at issue in this phase.

3 The PWS’ about face on this issue is telling. Rather than being concerned about
4 duplicative or “cumulative” testimony, the actual purpose of their motion is that Scalmanini has
5 made several admissions that validate Anaverde’s position that the groundwater beneath its
6 property is a separate basin, with virtually no meaningful hydraulic connectivity to the Antelope
7 Valley Groundwater Basin.

8 The only other witness, offered by the City of Los Angeles, against Anaverde is Mr.
9 Durbin—who has adopted the position that the release of "any molecule" from one basin to
10 another is sufficient to defeat separate basins. Durbin's theory is not based on science, but rather
11 on his acknowledged “result oriented” concern over the administrative and policy consequences of
12 adopting anything short of an "impenetrable barrier" approach. Mr. Durbin apparently fears that
13 anything short of a hydraulic “bright line” would lead to thousands of parties making similar
14 claims. (Deposition of Durbin, Sept. 29, 2008 at 248:19-258 and 249:1-5.)

15 In *Kelly v. New West Federal Savings* (1996) 49 Cal. App. 4th 659 (“*Kelly*”), the court
16 held that “it is a misuse of a motion *in limine* to attempt to compel a witness or a party to conform
17 his or her trial testimony to a preconceived factual scenario based on testimony given during
18 pretrial discovery.” (*Id.* at 659.) Though the context of this case is slightly different than the issue
19 at hand, the PWS cannot exclude evidence from Phase 1 simply because such testimony may be
20 adverse to their interests in this phase of trial. Given the related nature of Phase 1 and Phase 2 of
21 this adjudication, it seems logical that opinions rendered by Scalmanini during Phase 1 are
22 admissible for purposes of determining the characteristics of the adjudication area, particularly
23 since Scalmanini has been retained as the PWS’ expert since the inception of this action.

24 The *Kelly* court also provided that “[u]nder appropriate circumstances, a motion *in limine*
25 can serve the function of a 'motion to exclude' under Evidence Code section 353 by allowing the
26 trial court to rule on a specific objection to particular evidence.... [¶] In other cases, however, a
27 motion *in limine* may not satisfy the requirements of Evidence Code section 353.” (*Id.* at 671.)
28 Moreover, “it may be difficult to specify exactly what evidence is the subject of the motion until

1 that evidence is offered. Actual testimony sometimes defies pretrial predictions of what a witness
2 will say on the stand. Events in the trial may change the context in which the evidence is offered
3 to an extent that a renewed objection is necessary to satisfy the language and purpose of Evidence
4 Code section 353.” (*Id.*) Therefore, “*until the evidence is actually offered, and the court is aware*
5 *of its relevance in context, its probative value, and its potential for prejudice, matters related to*
6 *the state of the evidence at the time an objection is made, the court cannot intelligently rule on*
7 *admissibility.*’ (46 Cal.3d at p. 975, fn. 3.)” (*Id.* (emphasis added).) Absent concrete examples of
8 the type of “cumulative” testimony that the PWS seek to exclude, the Court should deny the
9 motion to exclude Phase 1 testimony of Mr. Scalmanini.

10 Phase 1 of this adjudication took place almost two years ago. Given the passage of time,
11 testimony offered during Phase 1, relating to the characteristics of the Basin, should be introduced
12 to: (1) refresh the recollection of parties present, and (2) inform those who were not represented
13 during Phase 1. From reviewing the Phase 1 trial transcripts, Mr. Scalmanini actually testified and
14 presented evidence that the Anaverde Basin was outside the adjudicated area, a position that held
15 true through the historic literature and, in fact, as it was presented in Exhibit 6 on fault structures
16 to the Phase 1 trial. Anaverde was not a party to that action and is not collaterally estopped from
17 litigating this issue since no party was representing its interest at that time. Nevertheless,
18 Scalmanini's admission then, in conjunction with his statements during recent testimony, that the
19 passage of some water from one basin to the next can be negligible and not defeat the separate
20 nature of each, must be admitted to ensure an accurate and fair adjudication of the water rights at
21 stake.

22 **III. CONCLUSION**

23 Scalmanini's testimony is not cumulative. Rather, it contradicts Mr. Durbin’s literal
24 definition which finds no support in the case law, scientific literature, or the real world. His
25 candor and objectivity on this point (despite representing an adverse party to Anaverde) provide
26 important guidance for this Court and should not be ignored. Anaverde reserves the right to
27 question Mr. Scalmanini on all relevant issues. To the extent that the Court thinks that there is an
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undue burden on the Court’s resources, it is free to exercise its discretionary under California Evidence Code section 352.

DATED: October 2, 2008

Respectfully submitted,

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By: /s/
KIMBERLY A. HUANGFU
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PROOF OF SERVICE

I declare that:

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 221 North Figueroa Street, Suite 1200, Los Angeles, California 90012.

On October 2, 2008, 2008, I served **ANAVERDE’S OPPOSITION TO PUBLIC WATER SUPPLIERS’ MOTION *IN LIMINE* NO. 1** a posting the document(s) to the Santa Clara Superior Court website in regard to the Antelope Valley Groundwater matter.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct, executed on October 2, 2008, 2008.

Maritza Estrada